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Ms. Magalie R. Salas
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JAN 19 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Petition for Reconsideration
MM Dkt. Nos. 98-43/94-149

Dear Ms. Salas:

Transmitted herewith on behalf of KCWE-TV, Inc. are an original and nine copies of its Petition for Reconsideration or Clarification in the above-specified rulemaking proceeding.

Respectfully submitted,

Barbara K. Gardner

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BKG/gfe
Enclosures
cc (w/encl.): Robert B. Liepold
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UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

KCWE (formerly KCWB-TV, Inc.) has found itself in just such a circumstance over the last several years. In 1994, its 1986 application to construct a new television station on Channel 32 in Kansas City was granted. However, due to suburban housing development in the intervening years, the local Board of Aldermen denied KCWE's application for a Special Use

Permit for the property KCWE had leased for its future tower site, and KCWE discovered that there is no fully spaced site available for Channel 32 for which it could obtain local zoning approval. As a result, KCWE in 1996 proposed the substitution of Channel 29 for Channel 32 in Kansas City, simultaneously filing an application to modify its construction permit to specify that channel (utilizing a nearby site and an existing tower). Although the Commission promptly issued a Notice of Proposed Rule Making proposing the requested substitution of Channel 29 for Channel 32, the pendency of the digital television allotment proceeding has delayed Commission action on the NPRM. As of this date, neither the allotment rulemaking nor KCWE's modification application has been acted upon, and it has therefore been necessary for KCWE to seek several extensions of its original permit.^{1/}

In the *Report and Order*, the Commission has established a new three-year construction period for broadcast facilities, and has also outlined two specific types of "encumbrances" that would toll the construction period during the time that the permittee was prevented from proceeding with construction due to causes not under its control. Unless a permit is subject to tolling, it will become null and void at the end of three years from the initial grant of the permit. See *Report and Order*, FCC 98-281 at ¶¶ 77-90.

^{1/} KCWE has nonetheless taken the unusual step, pursuant to special temporary authority, of constructing and operating since 1996 a full service Channel 29 facility at the same transmitter location specified in its construction permit modification application. Accordingly, KCWE will be able to "complete construction" as soon as the Commission allocates Channel 29 to Kansas City and approves KCWE's application to modify its permit to specify that frequency.

The first type of encumbrance specified is "an act of God," *i.e.*, a natural disaster such as a hurricane or earthquake. *See* FCC Rule 73.3598(b)(i), as revised. The only other type of encumbrance specifically recognized in the new rule is the pendency of administrative or judicial review involving the permit itself, or the pendency of a judicial proceeding "before any court of competent jurisdiction relating to any necessary local, state or federal requirement for the construction or operation of the station, including any zoning or environmental requirement." *See* FCC Rule 73.3598(b)(ii), as revised. Neither of these provisions covers the circumstance where a permittee's ability to construct is constricted pending other types of actions to be undertaken, including action by the Commission.

In KCWE's case, more than three years from the initial permit grant have elapsed, yet KCWE has never had an opportunity to construct pursuant to its existing construction permit. KCWE doubts that the Commission would actually require forfeiture of its permit simply because more than three years have passed without KCWE's being able to construct a Channel 32 facility, since KCWE has actually operated a full service television station since 1996 pursuant to special temporary authority. KCWE also believes, however, that the Commission's new rules concerning construction permits should be as clear as possible, and should therefore take into account as many identifiable types of circumstances under which relief from the three year construction period is warranted. Because KCWE's situation is very likely to apply to other permittees, both currently and in the future, KCWE believes that the Commission should make specific provision for this circumstance under its rules. Accordingly, KCWE proposes that the Commission adopt a third instance under which the three year construction period will be

automatically tolled. Specifically, it requests that the Commission adopt the following additional "tolling" provision under revised FCC Rule 73.3598:

The period of construction for an original construction permit shall toll during any period when the permittee is operating a full service facility pursuant to special temporary authority pending Commission action on its application for modification of the underlying construction permit.

There should be no objection to the adoption of this minor clarification, which would reduce confusion and ease the Commission's transition to its new construction permit procedures. For this reason, KCWE strongly urges its adoption on reconsideration.

Respectfully submitted,

KCWE-TV, INC.

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